CCC Group, Inc. *and* International Union Of Operating Engineers, Local 925, AFL–CIO, Petitioner.
Case 12–CA–21800

January 30, 2004

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On May 7, 2003, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief and cross exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified and to adopt the recommended Order[3] as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that Respondent, CCC Group, Inc., Bartow, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Refusing to consider for hire and refusing to hire employee applicants because they are union organizers or because of their union affiliation."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. January 30, 2004

Wilma B. Liebman, Member

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

[1] The Respondent has filed exceptions to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent's exceptions also imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[2] We agree with the judge that the Respondent violated Sec. 8(a)(3) and (1) by refusing to consider for hire and refusing to hire applicant Michael Kell. To establish a discriminatory refusal to hire, the General Counsel must show, inter alia, that the Respondent was hiring or had concrete plans to hire. *FES*, 331 NLRB 9, 12 (2000), enfd. 301 F.3d 83 (3d Cir. 2002). The judge failed to make an explicit finding regarding this element of the General Counsel's case. As more fully set forth in the judge's decision, in April 2001 Kell applied for the position of "Operator," and was interviewed by the Respondent. Following his application, Kell continued to make his interest in employment known to the Respondent, and was told that the Respondent kept applications active for 6 months to "years." On May 3, the Respondent placed a help-wanted advertisement in the local newspaper seeking a "Crane Operator" and, on August 24, the Respondent hired Paul Harrell as a crane operator. We find that the foregoing evidence establishes that the Respondent was hiring.

In adopting the judge's finding of a violation, Member Schaumber notes that the parties do not dispute that Kell was a legitimate applicant. Further, Member Schaumber is of the view that the General Counsel should be required to show, as part of his initial burden under *FES*, supra, that the applicant met the actual qualifications for the position established by the employer. In general, this would require proof that the alleged discriminatee met the announced or advertised qualifications for the job, unless the employer is shown to have applied lower standards in practice. Applying this standard, Member Schaumber finds that the General Counsel met his *FES* burden in this case.

Member Schaumber additionally finds, in agreement with the judge, that the Respondent failed to prove its claim that, even if Harrell had not been hired for the crane operator position, it would have hired one of the other applicants for the position instead of Kell. He finds it unnecessary to rely on the judge's additional comment that, under *FES,* the only permissible comparison is with other applicants who were hired.

[3] We have modified the judge's notice to more closely reflect the violations found and the judge's recommended Order. Additionally, we find merit in the General Counsel's exception to the judge's failure to include in his affirmative Order a provision requiring the Respondent to cease and desist from refusing to consider for hire and refusing to hire "employee applicants," and we shall modify the recommended Order and notice accordingly.

At the compliance stage, Member Schaumber would consider whether any salary paid to Kell by the Union should be deducted from any backpay awarded to him.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to consider for hire and refuse to hire employee applicants because they are union organizers or because of their union affiliation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Michael Kell employment in the position for which he applied or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges that he would have previously enjoyed.

WE WILL make Michael Kell whole for any loss or earnings and other benefits suffered as a result of our unlawful refusal to consider him for hire and our unlawful refusal to hire him, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to consider and the refusal to hire Michael Kell, and within 3 days thereafter notify Michael Kell in writing that this has been done and that our unlawful conduct will not be used against him in any way.

CCC GROUP, INC.

Ananyo Basu, Esq. and *David Cohen, Esq*. for the General Counsel.

James S. Cheslock. Esq. (Cheslock, Deely & Rapp, P.C.), of San Antonio, Texas, for the Respondent.

Mike Kell for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. This case was tried in Tampa, Florida, on February 24 and 25, 2003. The charge was filed by International Union of Operating Engineers, Local 925, AFL–CIO (Union) on September 18, 2001,[1] and the complaint, which was issued December 28, alleges that CCC Group, Inc. (Respondent or CCC) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), since on or about April 20 by refusing to consider for hire, and refusing to hire, employee applicant Michael Kell because Kell joined, supported, and assisted the Union, and engaged in concerted activities, and to discourage employees from engaging in these activities. In its answer to the complaint, General Counsel's Exhibit 1(f), the Respondent admits that it refused to hire Kell, it denies that it refused to consider Kell for hire, it denies that it refused to hire Kell because he joined, supported, and assisted the Union, and engaged in concerted activities, and to discourage employees from engaging in these activities, and it makes the following statement:

> Respondent denies that Michael Kell's union membership or activity was a factor in its decision not to offer him a job. However, even if anti-union animus was a factor in Respondent's decision, Respondent affirmatively alleges that Kell would not have been hired even in the absence of anti-union animus.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Texas corporation, has been engaged in the business of providing general construction and manufacturing services out of its facility located at Bartow, Florida, where it annually purchases and receives goods and materials valued in excess of $50,000 directly from points outside the State of Florida. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

In July 1998 John Matejek opened the Respondent's facility at Bartow. Matejek, who has been with the Respondent for over 20 years and a manager since 1985, became the regional manager in charge of the Bartow operation. The Respondent, whose corporate offices are in San Antonio, Texas, has operations in other states and in other countries. Its employees operating out of its Bartow facility have never been represented by a union. Matejek testified that in states other than Florida, he did not indicate which, CCC has collective-bargaining agreements with unions. A majority of the Respondent's work out of Bartow is in the phosphate open (above ground) mines and plants. Its phosphate customers are Cargill Fertilizer, IMC Phosphate, and CF Industries. The Respondent has about 80 people at its Bartow operation. Approximately 65 are employees. They include laborers, welders, concrete workers, pipe fitters, operators, and general and pump mechanics. Matejek testified that CCC has written hiring policies which establish preferential hiring priorities for field projects.[2] The Respondent uses welding machines,

[1] All dates are in 2001 unless otherwise indicated.

[2] R. Exh. 3. The procedures, as stated on page one of the document, read as follows:

> It is the policy of our Company to staff jobs with former employees whenever possible. . . . Accordingly, all Project Managers will staff their jobs in the following manner:

cutting equipment, compressors, man lifts, cranes, pickers, front end loaders, forklifts, and boom trucks. The Respondent does not own any of the cranes it operates out of Bartow. Rather, it rents the cranes from Bud Keene Crane, All Sunshine Crane, and Maxim Crane. The Respondent does not hire crane operators from another company. A lot of its work in the open phosphate mines is pump work and cranes are used to lift and set the pumps. Cranes are also used in maintenance work to set grating and plate. When cranes are used to repair a drag line, which is equipment which digs overburden off the phosphate and digs the phosphate out of the ground, the mine usually furnishes the crane and the operator. The Respondent has used cranes ranging in size from 20 tons to 110 tons. Of the companies from which it rents cranes, All Sunshine lets the Respondent bare rent (The Respondent supplies its own operator.), Bud Keene Crane will not allow the Respondent to bare rent cranes, and Maxim Crane sometimes allows the Respondent to bare rent cranes. On 150-ton cranes and above, All Sunshine requires the Respondent to use an All Sunshine operator.

On April 18 the Florida Gulf Trades Building Council had a meeting which Kell attended. It was held at an Ironworkers' union hall, and representatives from all the crafts attended. There was a discussion about a lot of work coming up in the phosphate industry. The president of the Council, Ed Dees, mentioned that union contractors were complaining about the low bids of CCC, and he said that an organizing drive should be started at CCC to get that company up to a level playing field.

On April 20 Kell, who is a business agent and organizer for the Union, went to the Respondent's Bartow facility to fill out an application for employment. He was given an application by one of the Respondent's secretaries, Chris Malys. When he completed the application, he was interviewed by the Respondent's operational manager at Bartow, Terry Atchley. Kell testified as follows about this interview:

> And when I walked in the door, he [Atchley] stood up behind the desk. . . . I shook his hand and he introduced his self. I told him who I was, and sat down. He had my application in his hand and he started telling me about CCC Group, said, . . . they're a large company, they do work all over the country and overseas, and they're doing all aspects of construction. . . .
>
> And I sat down in the chair, again at his desk, and he sat down. And he picked up my application. And he says, well, what all . . . do you operate? I told him, I said, . . . I operate cranes and backhoes and track hoes, loaders, stuff like that, but . . . mostly cranes. I said I have a certification for crane operator's license, and . . . I'm qualified to run friction, hydraulic, large, small, crawler cranes, the whole nine.
>
> . . . I told him that I also had a license for running forklifts.
>
> And he lifted the page on the application and he started looking at the next page, and, . . . then he kind of leaned down at the application, looked back at me real quick, and he had a real surprised look. And he . . . [did] that about three times, like a triple take, just bounced up and down, like that, looking at me.
>
> And he says, well, are you still employed with Operating Engineers? I said, yes, sir. He said, well, why do you want to leave the union and come to work here? I said, well, . . . I won't leave the union. I said I can work for the union and fulfill my union obligations on my own time. I said, but it's also my job as a union organizer to go out and do such a good job for you that . . . you won't be afraid to hire union people.
>
> And he shoved the application down like that, and he . . . said, well, we don't hire crane operators . . . we don't hire crane operators, we've got four certified crane operators and two cowboys that run our equipment here, we don't hire crane operators.
>
> And I was getting up at the same time. I said—he said, he was kind of extending his arm towards the door. And I said, well, you know, I can do more than just operate—no, he said we've got four certified operators and two cowboys that run our equipment and we don't hire crane operators. And he said, besides, our guys do more than just operate equipment.
>
> And we're both standing by now and he's extended his arm to the door. And I said, well, I do more than operate, too, I said I worked for Milton J. Wood Company for the last five years down at Tropicana, and I said whatever we was doing there, I was involved. I said . . . I can burn, weld, tie rebar, build forms, finish concrete, hang iron, you name it, I've done it . . . I said and you can call them and check with them. I'll tell you right now, they'll tell you I'm an asset to your company.
>
> And by now, I'm out the door and he's standing at the doorway. And he says, well, CCC's non-union down here in Florida. He said, but we do have a union side, he said are you willing to travel? I said yes, sir. He said, well, do you mind if I send a copy of your application to . . . Bruce Hillman . . . out of San Antonio. I told him . . . I don't

---

> Group One—Former employees who apply for work and are eligible for rehire will be given first priority hiring preference.
>
> Group Two—Current employees whose work is nearing completion may be transferred to projects where additional workers are needed. These workers have the same preference as persons in Group One.
>
> Group three—When person in Groups One and Two are unavailable, the Project Manager should show a preference to qualified applicants who are strongly recommended by current Company employees.
>
> Group Four—Persons who do not fall into Groups One, Two or Three may be hired only when absolutely necessary.
>
> . . . .
>
> The Company prefers to hire persons with skills in a number of crafts whenever possible; multi-craft personnel are more versatile than individuals whose skills are limited to a particular craft.

Each of the three pages of the policy manual received as R. Exh. 3 has "Rev. Date 6-25-02" at the bottom. Matejek testified that this notation at the bottom of the page means that it was revised June 25, 2002. Notwithstanding this, on cross-examination Matejek testified that the first page "kind of said everything that's on the second and third page[s] [of the document] which has been in effect for years." (transcript page 247) He also testified that he first saw page one of the document after June 25, 2002.

> mind if you do that. He said, well, he'd send it out there in case he could use me somewhere, but we don't hire crane operators. If we need additional cranes with operators, . . . we rent a crane with operators. We don't hire crane operators.
>
> I said, well, okay, . . . I appreciate your time, keep me in mind, if you change . . . [your] mind. He said he would. And, . . . [in] three minutes time, I was out the door. it was that quick. [Tr. 108–111]

In his application, General Counsel's Exhibit 9, Kell indicated that he was applying for an operator's position. On page two of the application, Kell listed as his most recent employer the Operating Engineers, Local 925, he indicated that his job title was organizer, and for "Duties" he indicated "Educating nonunion employees of Section 7 Rights." On the two pages of skills assessment, which is a part of the application, Kell indicated that he had 5 years' journeyman experience in both light and heavy rigging, 5 years' experience in heavy equipment repair, diesel engine repair, and small engine repair, 8 years journeyman experience in each of the skills of operating a boom truck, hydraulic crane, conventional crane and forklift, and 5 years' journeyman experience on both an excavator and rubber tired loader. Kell also indicated on the second skills assessment page that he was a crane operator and a hoe operator, track or rubber tired. In the "ADDITIONAL COMMENTS" section on the second page of the skills assessment of the application, Kell wrote "Certification of crane operators license #98085978 Designations 1, 2, 3, 4 [General Counsel's Exhibit 8], IMC Site Specific Mine Safety & Health Administration Training, Florida Phosphate Council Safety Program." On cross-examination Kell testified that no employee at CCC had referred him and he had never worked for the Respondent before.

Atchley testified that Kell filled out an application, and he had a discussion with Kell at the time.[3] Atchley testified as follows about this meeting:

> I did hear someone in the lobby area asking for an application, to fill out an application. And then I was asked if I had time to see someone. I responded yes.
>
> Mr. Kell came into my office and to sit down [sic] for us to have a discussion which I assumed would be about employment opportunities. Mr. Kell introduced himself and identified himself as being a representative of an Operating Engineers local union, and that he would like to talk with me about the opportunities and possibilities of providing crane operators.
>
> Mr. Kell continued to tell me about his organization, what they do as far as having crane operators, qualified crane operators, that they can provide any type of operator, day or night, weekends, outages, that local area or somebody out of the . . . [way] areas.
>
> After Mr. Kell had the opportunity to explain to me what his opportunities of services that he thought he might could possibly provide to CCC Group through his organization, I then informed him how our operation was staffed and how we operated, that we did not own cranes at the Bartow office, that if we needed to rent cranes, we had people in our employ already that had crane operator skills, that we could use them, or if we needed to rent a crane with an operator on it, the crane rental companies always provided us operators, so I did not have a need for anyone to provide just crane operators to us. [Tr. 278, 279.]

On rebuttal Kell testified that he did not verbally introduce himself to Atchley as a representative of the Operating Engineers local; that he did indicate who he was on his application; that he did not tell Atchley that his local could provide qualified crane operators for day or night, or weekends or outages; and that three or four times during this meeting Atchley said that CCC does not hire crane operators.

General Counsel's Exhibit 3 is the classified ad that the Respondent ran in the Lakeland, Florida newspaper the Ledger on May 3 through May 8. It reads as follows:

> CRANE OPERATOR
>
> ENR Top 400 industrial contractor has a position for a conventional/hydraulic crane operator in our Bartow office. Top pay and benefits. Call 863/533-1494.
> EOE/Post Offer Drug Screen.

The telephone number in the ad is the Respondent's telephone number at its Bartow facility. Matejek testified that he did not recall when the last time before the May 2001 ads the Respondent placed an ad for crane operators; that he thought that the Respondent's corporate office placed the ad; that the Respondent did not need crane operators at Bartow in May 2001; that the corporate office had input from Bartow to place the ad; that he did not remember if he or Atchley or a secretary asked for the ad to be placed; and that

> We were bidding on some projects that were going to start later on that year and we thought as a possibility that some of the work we had going on, with operators on it, might run over each other, so there's a chance we might need an operator later on in the year. So we put an ad then to see.

Matejek further testified that the Respondent did hire a crane operator, Paul Harrell, later in the year; and that at CCC's operation in Bartow only he or Atchley have the authority to interview and hire. In response to questions of Respondent's counsel, Matejek testified that at the time the ads were placed the Respondent (a) had 10 to 12 employees at Bartow who could operate cranes, and many of them had worked for the Respondent for years, and (b) thought that it would eventually need crane operators on the Cargill Bartow phosphate reactor project which was in progress at the time. Cranes were used on the Cargill Bartow project to hang iron and set equipment up.

[3] The following exchange occurred between Respondent's attorney and Atchley:

> Q. Did you ever interview him [Kell]?
>
> A. I don't understand the exact definition of the word interview.
>
> Q. Well, did Mr. Kell ever come to CCC Group's office and talk to you about employment?
>
> A. He came to our office and filled out an application. And, yes, I did have a discussion with him.

This was done toward the end of August 2001 when Harrell was hired.

On May 8 Milton Lee, who has been a crane operator for 33 years, telephoned the Respondent's office in Bartow. He had seen the above-described ad. The lady who answered the telephone told him that he had to come in and fill out an application. When she started to give him directions he realized that he used to work in the same building with a company called Florida Equipment, and the lady with whom he was speaking, Malys, also used to work at Florida Equipment. Milton Lee testified as follows about this telephone call:

> We talked a little bit. I asked Chris a little more about the job. She said . . . she couldn't answer those questions, that I would have to come by and fill out the application. I told her I was working and I couldn't come by, at that time, was there anybody that possibly I could talk with over the phone. She said she wasn't sure, that she would see.
>
> . . . .
>
> . . . At that time, Terry Atchley came on the telephone and I … introduced myself and [said] that I had called inquiring about the ad in the paper. And he started to give me a little run down of the company. They were out of San Antonio, a large company, worked through the United States and overseas.
>
> And he went on to explain to me that they didn't have any cranes here, that they bare rented, and that they were looking to hire two more crane operators in the Bartow area, that they had already hired one that they classed as a crane operator.
>
> We talked a little further. I exchanged some background with him. He gave me a little more on the company. I asked him how much he was paying. he said it started at $17.

Milton Lee further testified that Atchley did not ask him if he was in the Union and he did not tell Atchley that he was in the Union; that after Atchley told him the starting pay Atchley "added at the same time that they expected there would be other duties to be performed except for running the crane, when you weren't running it" (Tr. 138); that he understood this to mean that if the Respondent did not have a crane to operate, he would be expected to do multi-jobs; that at the time he was making more than $17 and he told Atchley this; and that Atchley said that if he was still interested in the job, he needed to come in and fill out an application. Milton Lee never filled out an application with the Respondent.

Respondent's Exhibit 5 is a "CCC GROUP, INC., CONDITIONAL JOB OFFER" to Marvin Lee. The "Date of Job Offer" is "05/23/01" and the "Date of Employment" on the same form is "5/29/01." The form also indicates "operator" on the "Craft/Skill level" line. Matejek testified that he interviewed and hired Marvin Lee, who was offered the job on May 29; that Marvin Lee was the first person hired after Kell applied; that he hired Marvin Lee instead of Kell because Marvin Lee was more qualified than Kell and Marvin Lee was a rehire; that while he hired Marvin Lee as an operator, Lee did not work as an operator but rather he worked in the shop doing fabrication work; that Marvin Lee quit after a week; and that he did not use Marvin Lee to operate cranes during the week that he worked for CCC.

Respondent's Exhibit 4 is the application for employment of Marvin Lee, dated "05/25/01," for a "top operator" position. It indicates that Marvin Lee worked for CCC before. In the skills assessment portion of the application he indicated that he did a variety of things, including 30 years operating hydraulic cranes and 10 years operating conventional cranes. Marvin Lee indicated that he had experience as a foreman or supervisor in about 50 of the approximately 80 categories listed. Respondent's Exhibits 4 and 5 were not introduced.

On May 25 after a regularly scheduled union meeting, member Milton Lee told Kell that he had seen an ad in a newspaper for crane operators for CCC and he telephoned the Respondent. Kell obtained a copy of the ad. On cross-examination Kell testified that a fellow member, Milton Lee, told him that during his interview Atchley said that the Respondent had already hired one man as a crane operator and was looking to hire another. Milton Lee has been a member of this Union for 33 years. He testified that he attended this union meeting and after the meeting he told Kell that he saw the Respondent's classified ad for crane operator, and he telephoned the Respondent about the ad.

Before work on the morning of May 31 Robert Willis, an employee of the Respondent since mid-May 2001, presented Atchley with a letter of intent to organize the Respondent's employees (GC Exh. 11). Willis had not indicated that he was a member of Ironworkers Local 387 to the Respondent prior to this. On May 31 for the first time while working at CCC Willis wore union paraphernalia, namely a union shirt and hat. Willis testified that he was supposed to go out in the field that day but Atchley asked him to stay in the shop area; that he had never worked in the shop prior to that; that about 45 minutes later he was told to go to Matejek's office; and that just he and Matejek were present. With respect to what was then said, Willis testified as follows:

> He said he needed to lay me off due to he didn't need any ironworkers. And I told him that I hadn't done any iron work since I'd been there. And he said that he didn't need me. And I asked who was going to do my job. He said he'd get a laborer to do my job. And I told him that I was more than willing to do labor type work. And then he yelled at me and said that this was a union company and – or he didn't know what I was up to, but this was a union company and it was going to— he cursed, he said the F word, that it was going to stay that way.
>
> JUDGE WEST: I'm sorry. For the record, you said this is a union company?
>
> THE WITNESS: He said—I'm sorry, a non-union company and it was going to F'ing stay this way.

Counsel for General Counsel indicated that Matejek's alleged statement was only being offered to show animus. Willis further testified that a few days earlier Atchley told employees that the employees needed to be at work on time because the company was so piled up with work; that he asked Matejek if it would be alright if he showed up for work and filled in for people who missed work or were laid off; that Matejek then said

that he would get Willis for trespassing; that Matejek said he could get his personal tools; that when the shop foreman asked him what was happening he told him that he was laid off because of his union affiliation, and Matejek then came up to him and said that if he didn't leave the property he would "fucking" drag him off himself; and that he told Matejek that he did not want any violence and he would leave on his own accord.[4] On cross-examination Willis testified that on May 26 he got up in a man lift and stood on the midrail, which is a safety violation; that the violation was witnessed by a safety representative of the Respondent's customer; that this safety violation was brought up at a safety meeting on May 30 by Respondent's safety director, John Halbrooks; that when Halbrooks asked if there were any comments he, Willis, said that he did not agree with the way the incident was described because on two previous occasions before the incident he complained that he and the operator of the man lift were not properly trained and he did not feel safe doing the work, notwithstanding this the foreman made him and his coworker use the man lift, and he thought that the foreman should take the violation and not the two employees who were not properly trained; that Halbrooks then told him not to "square up to him" (Tr. 168) and Halbrooks pointed his finger at him; that at this point he told Halbrooks that he was not going to take any "ass chewings"; and that he did not believe that he was going to be in trouble because of what he said to Halbrooks after the safety meeting because he, Atchley and Halbrooks "all talked and everyone was fine, we shook hands, and we left . . . [a]nd I considered everything was fine." (Tr. 175) Willis also testified on cross-examination that on May 31 he told employees in the shop when he went to get his tools that he was laid off due to his union affiliation; that there is no reference in his affidavit to the NLRB to Matejek cursing when he told him to leave the premises or threatening to drag him off[5] ; that a Mine Safety and Health Administration (MSHA) inspector, John Reed, ordered him off a mine site on June 7 because while he had given the Respondent a document indicating that he had the necessary training to work on a MSHA mine site, the inspector determined that this was not true; that CCC then put him to work in the shop; and that the next day he quit.

Matejek testified that he was in Miami with a client on May 30 and Atchley telephoned him on his cellular telephone while he was on his way back to Bartow; that he told Atchley to have Willis work in the shop the next morning and he would take care of the matter; that on May 31 he told Willis that he was going to lay him off so he could get another job, and he could get his personal tools out of the shop; that subsequently the shop foreman called him and said that Willis was in the shop hollering and screaming; that he went to the shop and told Willis to get off the property; that he did not curse Willis and he did not make any comments that the Company is a nonunion company and it was going to stay that way; that after Willis left, he telephoned the corporate office in Texas on May 31, and he was told to reinstate Willis; and that Willis came back to work and then quit days later after he was told to leave a mine site by a MSHA inspector because although Willis, as required, carried a certificate on his person indicating that he had been to school, passed training to work in mines, and had worked in mines, Willis admitted to the inspector that he had never worked in the mines. Subsequently Matejek testified that he thought he might have telephoned corporate offices on May 30 and told John Moran, who is in charge, that he was going to lay Willis off the next morning.

On June 4 Kell telephoned the Respondent and he asked the woman who answered if they were hiring. The woman told him that he would have to fill out an application and when he told her that he had already filled one out she told him that the Respondent keeps the applications active for 6 months but he could come in and reapply. Subsequently he stopped at the Respondent's office and told the secretary, Chris, that a friend of his told him that he had seen an ad in the paper for crane operators. The secretary told him that was last month but he could fill out an application. When he told the secretary that he filled out an application last month, she spoke to Atchley, who looked at Kell, and then the secretary told Kell "we're not hiring crane operators." (Tr. 118) The Respondent never contacted him after this.

In August 2001 Paul Harrell was hired as a crane operator. His application for employment, which is dated "8/21/01," was received as General Counsel's Exhibit 4. Of the total of about 80 "SKILLS" categories listed on the two page skills assessment portion of the application, Harrell wrote 6 years for heavy rigging, 6 years for hydraulic crane, and 6 years for aerial lift off road haul truck, dump truck. According to that portion of Paul Harrell's "CONDITIONAL JOB OFFER," form, Respondent's Exhibit 1, his "Craft/Skill level" was "multi." Matejek filled out this portion of the form and he also wrote "8/24/01" for the "Date of Employment" on the form. On the portion of the Conditional Job Offer form filled out by Paul Harrell, he wrote "8-20-01" for the "Date of Job Offer." According to the testimony of Matejek, the last time that the Respondent hired a crane operator before that was in May 2001 when it hired Marvin Lee, who as noted above did not operate cranes while he was employed by the Respondent. Paul Harrell did operate cranes for the Respondent. Matejek testified that he interviewed and hired Paul Harrell; that one of the Respondent's employees, Keith Harrell, recommended Paul Harrell, who is Keith Harrell's nephew; that the Respondent hires multicrafted people as much as it can and he discovered during his interview with Paul Harrell that he could operate cranes, weld, bolt steel, and hang iron, among other things; that while Paul Harrell's application does not list welding, Keith Harrell told him that Paul Harrell could weld and he had 6 to 7 years experience as a welder; that Paul Harrell was hired as a multi-craft employee; and that Paul Harrell operated a crane 13 of the 45 days he worked for the Respondent. On cross-examination Matejek testified that Keith Harrell had been working for CCC about 1 week when he recommended that Paul Harrell be hired.

[4] Willis filed a charge with the NLRB the afternoon of May 31 (GC Exh. 14. The charge alleges that CCC discharged Willis because of his union sympathies and physically threatened Willis. Willis went back to work on June 4. Four days later Willis quit. The charge was settled GC Exh. 15. The settlement agreement contains a nonadmission clause.

[5] As noted above, the charge filed May 31 with the Board (GC Exh. 14), regarding Willis' discharge includes an allegation that CCC, through its agents and representatives ". . . physically threaten . . . ed] Willis. . . ."

The Respondent's hourly labor rate and equipment rate schedule as of "8/15/01" was received as General Counsel's Exhibit 2.

In October 2001 Paul Harrell was fired by the Respondent. Harrell had been operating a 110 ton crane, which was rented from All Sunshine, on the reactor at the Cargill Bartow plant. According to the testimony of Matejek, Paul Harrell got into a scuffle with some folks at the Cargill Bartow Plant, and a Cargill representative, who saw the scuffle, said that Paul Harrell had to get off Cargill's property. His payroll record for the year 2001 through payroll period ending "11/26/01" was received by stipulation as General Counsel's Exhibit 16. The Respondent also stipulated that the operator safety checklist stubs provided by the Respondent pursuant to General Counsel's subpoena show that Harrell operated a crane in 2001 on the following days: August 25, 26, 28, and 29, September 6, 20, 21, 26, and 30, and October 2, 3, 4, and 11. Additionally, the Respondent stipulated that the cranes operated by Harrell included a 110-ton Krupp crane and a rough terrain Grove 750.[6] One of the Respondent's other employees, Gerald Caulder, operated the crane after Paul Harrell was fired. Matejek testified that after Paul Harrell was fired, CCC did not hire any other person to operate cranes; that if he had not hired Paul Harrell he would not have hired Kell because he had other applications which indicated that the applicants were better qualified than Kell (transcript page 239), and he "probably" would have hired any one of these other applicants before he would have hired Kell (Tr. 240).[7]

General Counsel's Exhibits 6(a) through (nn) are invoices dated from February 14 to December 12, 2001, from All Sunshine Crane Rental Corporation to the Respondent for crane rentals.

Respondent's Exhibit 10 are its operator safety check lists prepared by CCC employees who operated cranes from March 29 to December 15, 2001.

Respondent's Exhibit 11 is a monthly crane use report for the months of April through December 2001, which indicates which of CCC's employees operated cranes during that period of time. And Respondent's Exhibit 12 is a crane use summary showing by month how many times during this period a CCC employee operated a crane.

General Counsel's Exhibits 7(a) through (z) are invoices dated from September 26, 2001, to December 27, 2002 from Maxim Crane Works to the Respondent for crane rentals.

Respondent's Exhibit 13 are Operator Safety Check Lists prepared by CCC employees who operated cranes from January through December 30, 2002

Respondent's Exhibit 14 is a monthly crane use report for the months of January through December 2002 which indicates which of CCC's employees operated cranes during that period of time. There are no entries for March, April, May, July, October, and November 2002 because CCC did not operate cranes during that period. And Respondent's Exhibit 15 is a crane use summary showing by month how many times during this period a CCC employee operated a crane. Atchley testified that there had been a drastic reduction of crane use through the year 2002 because CCC did not have the type of work which generated a lot of crane use or there had been minimal use with crane rental services that provided an operator.

On January 18, 2002, Kell went to the Respondent's office with about 18 other business agents and organizers. All of the other union representatives filled out applications. He told the secretary, Chris, that he already filled out an application, and she told him that he did not have to fill out another one because the application would be kept active for years.

On June 6 or 16, 2002, Christopher Rose was sent to work for the Respondent for 1 night as a laborer by Able Body, which is a temporary service. He testified that he drove his truck, which had an Ironworkers' union sticker on it, to the Respondent's facility that night; that after he arrived at the Respondent's facility, he rode in a truck with John Taylor, who he described as a CCC supervisor, to the jobsite[88]; that Taylor was in a position to see the union sticker on his truck before they left the Respondent's facility; that while they were driving to the jobsite he asked Taylor about CCC; and that Taylor made the following statement:

> He started off by saying that the company was out of Texas. he named two or three Texas cities, and gave some numbers behind them, the biggest one being San Antonio. And explained that he was here with the company, looking for work, because work was slow elsewhere in the country, and that they're a really good company, they can be pretty big, if they could get by the bullshit with the damn unions. Basically, what he said word for word.

Rose further testified that the matter of the unions did not come up again either that night or when Able Body sent him to work the night shift for the Respondent on a downed drag line on July 3, 4, and 5, 2002. Before working for the Respondent as a temporary employee, Rose had filed two applications for employment with the Respondent. The first was filed in June 2001 while he was still in the Ironworkers. He and several other Ironworkers went to the Respondent's facility dressed in union paraphernalia and filled out applications. He was told by the secretary, Chris, that the company was not hiring at the time. He filed another application, Respondent's Exhibit 2, on April

[6] Kell subsequently testified that he was qualified to operate both of these cranes.

[7] Matejek cited the applications of William Branch (R. Exh. 9), who was also recommended, Jon Roark (R. Exh. 8) who previously worked for CCC, Jeffrey Owens (R. Exh. 7), and Donnie Hall (R. Exh. 6). Of the four, Matejek interviewed Rourke. He did not hire Rourke because of something one of CCC's managers who worked in Arkansas said about Rourke's attitude.

[8] Rose testified that Taylor was a supervisor since Taylor was the one he and the other two temporary workers who went to Respondent's facility with him handed their tickets to, since Taylor was in control telling everybody what to do including CCC employees, since he believed that his ticket indicated that he should report to Taylor, and since there were no other CCC or Able Body supervisors at the job site that night. Matejek testified that Taylor is a supervisor; and that supervisors (1) plan and schedule work for the crews that work under them, (2) assign employees work, (3) base the assignments on the capabilities of the people who are to perform the work, and (4) make judgments about which duties to assign to the employee when he makes assignments on a daily basis.

29, 2002. This time he was referred by someone who knew someone who worked for the Respondent, Wade Prine. This time he was interviewed by Atchley who asked him where he learned how to weld. He told Atchley that he was an ex-apprentice out of the Ironworkers Local 397 but he was not longer in the Union. Atchley then told him that the company was not hiring at the time and he would give him a call if something came up. Rose never received a telephone call from the Respondent. On cross-examination Rose testified that he did check off the "Yes" box on the April 29, 2002 job application in answer to the question "Have you been convicted of a crime in the past ten years, excluding misdemeanors and summary offenses, which has not been annulled, expunged, or sealed by a court"; that he did not check off the box on the application indicating that he had applied with the Respondent before; and that in December 1997 he was convicted of burglary and grand theft, dealing in stolen property, and felony possession of a hunting rifle while on probation, and he was sentenced to a year in jail but he was released after 4 months for good behavior and for taking self help programs. Respondent's Exhibit 2 was not introduced.

Respondent's Exhibit 16 are the operators safety check lists for January 3, 6, and 7 2003, all of which were filled out by Larry Ray.

Analysis

Collectively paragraphs 5(a), (b), and (c) of the complaint allege that on or about April 20 Respondent refused to consider for hire and refused to hire employee applicant Kell because he joined, supported, and assisted the Union, and engaged in concerted activities, and to discourage employees from engaging in these activities. As forth set by the Board in *FES*, 331 NLRB 9, 12 (2000),

> The issues raised by the case . . . go to the most fundamental rights guaranteed by the Act. Protecting the exercise by workers of full freedom of association and self-organization is an express, central policy of the Act. See NLRA, Section 1. Unquestionably, the denial to employees of access to the work force because of their union activity or affiliation runs directly against this policy. The Board's treatment of allegations of discriminatory refusals to consider or to hire and its determination or related remedial issues is a measure of the Board's effectiveness in giving substance to the rights it is charged to protect.
>
> . . . .

To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity. In sum, the issue of whether the alleged discriminatees would have been hired but for the discrimination against them must be litigated at the hearing on the merits.

If the General Counsel meets his burden and the respondent fails to show that it would have made the same hiring decisions even in the absence of union activity or affiliation, then a violation of Section 8(a)(3) has been established. The appropriate remedy for such a violation is a cease-and-desist order, and an order to offer the discriminatees immediate instatement to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions, and to make them whole for losses sustained by reason of the discrimination against them. [Footnote omitted.

And as set forth by the Board in *FES,* supra at 15,

> To establish a discriminatory refusal to consider, pursuant to *Wright Line*, supra, the General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity of affiliation.
>
> If the respondent fails to meet its burden, then a violation of Section 8(a)(3) is established. The appropriate remedy for such a violation is a cease-and-desist order; an order to place the discriminatees in the position they would have been in, absent discrimination, for consideration for future openings and to consider them for the openings in accord with nondiscriminatory criteria; and an order to notify the discriminatees, the charging party, and the Regional Director of future openings in positions for which the discriminatees applied or substantially equivalent positions. [Footnote omitted.]

With respect to the refusal to consider allegation, General Counsel on brief contends that animus towards the Union appears to be not merely a factor but the sole factor in CCC's decision to refuse to consider Kell; that Kell was better qualified than Paul Harrell, but consideration of his application ended as soon as Atchley learned that Kell was a union organizer; that while Atchley told Kell a number of times that CCC does not hire crane operators, CCC sought to do just that when it placed the above-described classified ad in the Lakeland Ledger seeking applications, and when it told Milton Lee to come in and fill out an application; that when CCC hired a crane operator in August, Paul Harrell, Kell was never called

despite the evidence that CCC kept applications on file for 'six months' or 'years'; that CCC excluded Kell from its regular hiring process; and that CCC failed to adduce any evidence establishing that it would not have considered Kell for hire even in the absence of his union activities. CCC on brief argues that General Counsel's refusal to consider case fails because as stated in *Kanawah Stone Co.*, 334 NLRB 235 (2001):

> [E]even assuming that the General Counsel met his threshold burden under *FES*, we find that his case in chief was rebutted by the Respondent's showing that it lawfully would not have considered the applicants, even absent their union activity, because none of the applicants met any of Respondent's three hiring criteria [namely (1) employees on temporary lay off, (2) former employees, or (3) referrals from existing employees].

In *Kanawah Stone Co*, supra at 1, the Board indicated that "Persons who do not fall into one of these categories are not considered for hire." CCC also argues that the evidence does not show that Kell was excluded from the hiring but rather he fell into Group Four under CCC's hiring preferences because he was not a former employee, a transfer from another CCC project or a referral from a current CCC employee. Finally, CCC indicates on brief that Atchley had a brief interview with Kell after Kell completed his application.

Atchley's description of what occurred after Kell filled out an application at CCC on April 20 is set forth above. Atchley was not willing to concede that he interviewed Kell. When he testified at the trial herein Atchley did not want to treat what occurred with Kell on April 20 as a situation where Kell was seeking a job. Rather Atchley took the tack that Kell was there to sell the services that the Union could provide. The problem with this approach is that it does not explain why Kell would take the time to fill out a job application. Perhaps at some point CCC will argue that it was only Kell's means of getting his foot in the door so that he could make his sales pitch to Atchley. Unwittingly Atchley showed CCC's cards in that while he is not a credible witness, he was indicating how he treated Kell's April 20 visit to CCC Bartow office. Atchley and CCC never considered Kell as a job applicant. Atchley demonstrated this with his testimony at the trial herein. In *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995), the Supreme Court approved the Board's position that the definition of employee in Section 2(3) of the Act includes professional organizers who obtain employment with the employer solely for the purpose of organizing the employer's work force. Kell was a credible witness. His testimony about his April 20 meeting with Atchley is credited. Not only did Atchley show CCC's cards with his testimony about his April 20 interview with Kell, but Atchley failed to specifically deny that he told Kell that "CCC's nonunion down here in Florida." Once he realized that he had a union organizer in his office, Atchley wanted to determine whether Kell was going to continue organizing, and more particularly try to organize CCC's employees. That is why he asked Kell if he was going to leave the Union. The fact that Atchley then lied to Kell five or six times by telling him that CCC did not hire crane operators further demonstrates that Atchley was not going to consider Kell's application. Atchley did not specifically deny telling Kell a number of times that CCC does not hire crane operators. And the fact that Atchley then told Kell, a declared union organizer seeking a job with CCC, in this context that "CCC's nonunion down here in Florida" is an indication of CCC's antiunion animus.[9] General Counsel has demonstrated that CCC excluded Kell from the hiring process and that antiunion animus contributed to the decision not to consider Kell for employment.

Has CCC shown that it would not have considered Kell even in the absence of his union activity or affiliation? As noted above, on brief CCC cites *Kanawah Stone Co*, supra, for the proposition that a respondent can rebut General Counsel's case in chief by showing that it lawfully would not have considered Kell, even absent his union activity, because he did not meet any of respondent's three hiring criteria, namely (1) employees on temporary layoff, (2) former employees, or (3) referrals from existing employees. But as noted above, in *Kanawah*

[9] CCC's antiunion animus is further demonstrated by the May 31 termination of Willis after he gave Atchley a letter indicating that he was going to attempt to organize CCC's employees. The safety meeting discussion was not cited by Matejek for the reason for the termination when he told Willis he was being laid off because there was not enough work. Neither Halbrook nor Atchley refuted Willis testimony that the safety matter discussion was amicably resolved on May 30. Willis' testimony is credited both with respect to what occurred on May 30 and what occurred on May 31. Matejek lied to Willis on May 31 when he told him that he was being laid off because there was not enough work. CCC had plenty of work at that time. Matejek lied under oath when he testified that he discussed Willis' lay off with company management in Texas on May 30. He realized as he was testifying that if he telephoned Texas to discuss the layoff on May 31 why wouldn't he discuss the lay off on May 30 when he claimed that Atchley telephoned him on his cellular phone (uncorroborated by Atchley and not credited) early enough for him to telephone Texas. The only thing that changed between May 30 and when he laid Willis off on May 31 was the fact that Willis for the first time wore union paraphernalia and gave Atchley the letter indicating that Willis was going to attempt to organize CCC's employees. Matejek did not put Texas on notice on May 30 that he was going to lay Willis off. There may have been a call to Texas on May 30 about the Miami job but it was not shown that Texas was placed on notice on May 30 that Willis was going to be laid off. When Texas was placed on notice, Matejek was directed to immediately rehire Willis. Willis was laid off on May 31 because he wore union paraphernalia and gave a letter to Atchley indicating that Willis was going to attempt to organize CCC's employees. The fact that Matejek was willing to change his testimony on this matter and fabricate testimony as he realized that there was a problem with his first version demonstrates the length to which he would go to obfuscate the truth. Matejek was not a credible witness. I would not credit any of his testimony unless it is corroborated by a reliable witness or reliable documentation. Atchley was willing to tell a declared union organizer that "CCC's non-union down here in Florida." Willis' testimony that Matejek told him when he was laying him off that CCC was a non-union company and it was going to stay that way is credited. Once again CCC demonstrated its antiunion animus. Notwithstanding the fact that Rose is a convicted felon, Taylor did not testify to deny that he made the statement attributed to him by Rose. In these circumstances, Rose's testimony is credited. But as noted by CCC, Taylor's statement was made over a year after Kell filed his application for employment with CCC. There is sufficient evidence of record of antiunion animus even without considering the Taylor statement. Therefore, I am not relying on Taylor's statement in finding that CCC was unlawfully motivated.

Stone Co, supra at 1, the Board indicated that "Persons who do not fall into one of these categories are not considered for hire." In the instant case, CCC did not limit its hiring to these three categories. Indeed CCC placed a classified ad in the Lakeland Ledger for crane operators. And Atchley did not ask Milton Lee if he was being referred by a CCC employee when Lee telephoned and spoke to Atchley about the ad. CCC argues it has written hiring policies, Respondent's Exhibit 3, which establish preferential hiring priorities for field projects. However, each of the three pages of Respondent's Exhibit 3 indicates that it was revised "6-25-02." Matejek conceded that he first saw page one of the document after June 25, 2002. But Matejek testified that the first page "kind of said everything that's on the second and third pages which has been in effect for years." On brief General Counsel contends as follows:

> Moreover, the document Matejek claims was its [CCC's] published policy at the time Kell and [Paul] Harrell applied for hire, in 2001, pages 2 and 3 of the current hiring policy, does not include a preference for employee referrals, despite Matejek's assertion to the contrary. (R3-2nd and 3rd pages, Tr. 247–248).[5] Rather, those documents merely state that if employment needs cannot be filled by prior employees, Respondent seeks 'in-house referrals from other Project Managers' and the only reference to employee 'referrals' states that employees are encouraged to give their associates in the construction industry cards which list a telephone number for a recording or Respondent's human resources department which contains a detailed message regarding current job opportunities. (R3-2nd page).

[5] Even Matejek's assertion that pages 2 and 3 of the current hiring policy constitutes the former (pre June 25, 2002) policy is highly suspect since pages 2 and 3, like page 1, state at the bottom 'Rev. Date 6-25-02.' Respondent failed to introduce its previous published hiring policy, if any, in evidence.

General Counsel points out that CCC's hiring policy was not revised to reflect any multicraft preference or preference for referrals from current employees until June 25, 2002, months after the complaint was issued in this case. General Counsel contends that as such it gives rise to the inference that it was formulated after the fact and precisely to avoid liability in this matter.

On their faces pages 2 and 3 of Respondent's Exhibit 3 are contrary to Matejek's testimony. The first page does not "kind of said everything that's on the second and third pages which has been in effect for years." As pointed out by General Counsel, the second and third pages do not include a preference for employee referrals. Yet CCC did not make any effort to introduce the written policy that was in effect between April and August 2001, if there was any such policy. CCC was willing to rely on the testimony of Matejek, which was on its face obviously flawed without even getting into credibility. Matejek is not a credible witness so I do not credit his obviously flawed testimony about Respondent's Exhibit 3. CCC has not met the burden shifted to it to show that it would not have considered Kell even in the absence of his union activity or affiliation. CCC has not shown that there was any justifiable reason for placing Kell in Group Four, as it asserts it did, because CCC has failed to show that Group Four even existed, as here pertinent, between April and August 2001.[10] In actuality Kell never received any consideration after Atchley saw page two of his application. CCC's Group Four argument is nothing more than a flawed false post hoc rationalization.

With respect to the refusal to hire allegation, Kell was told by CCC at one time that CCC keeps the applications active for 6 months, and another time Kell was told by Malys that CCC keeps the applications active for years. Kell's application therefore was available to be considered when Paul Harrell was hired. General Counsel has shown (1) that the Respondent was hiring at the time of the alleged unlawful conduct, (2) that Kell had experience or training relevant to the announced requirements of the position for hire, and (3) that antiunion animus contributed to the decision not to hire Kell. Consequently, the burden has shifted to CCC to show that it would not have hired Kell even in the absence of his union activity or affiliation. As indicated above, CCC must show that Paul Harrell had superior qualifications and that it would not have hired Kell for that reason even in the absence of his union support or activity.

On brief CCC argues that Paul Harrell had preferences under CCC's hiring policies; that applying *FES*, supra, the Board has held that even though union animus is present, an employer does not violate Section 8(a)(3) of the Act when it hires applicants pursuant to neutral hiring policies that give preferences to applicants who are former employees or individuals who are recommended by current employees, *Brandt Construction Co.*, 336 NLRB 733 (2001); that Paul Harrell had a hiring preference not possessed by Kell in that Paul Harrell had a Group Three preference since he was recommended by a current CCC employee, his uncle Keith; that Kell was a Group Four applicant which meant that he was to be hired only when absolutely necessary; that Paul Harrell also had multicraft skills as an ironworker and welder, and he performed multicraft work when he was not operating cranes; that there is insufficient evidence to establish union animus; that even if there is sufficient evidence of union animus, there was no violation of Section 8(a)(3) of the Act with respect to the failure to hire Kell because the evidence shows that Kell would not have been hired even in the absence of his union affiliation in that when Harrell was hired CCC had applications on file from individuals, namely Hall, Owens, Roark, and Branch, whose work experience and extensive multicraft skills made them a better candi-

[10] General Counsel's request for an inference that CCC's revised hiring policy was formulated after the fact and precisely to avoid liability in this matter is denied in that while CCC is attempting to use the revised policy in the instant case, it has not been shown that it was formulated solely for that purpose. In view of other of my findings herein regarding Atchley and the May 30 safety meeting, the alleged May 30 Atchley cellular telephone call to Matejek (Since Matejek is not a credible witness and since this testimony was not corroborated by a credible witness, it was not credited.), and Taylor's alleged statement to Rose, General Counsel's requests for other specified inferences are denied. General Counsel's contention regarding Rose's speculation as to why Atchley lost interest in hiring him is just that; speculation. Accordingly, the request of General Counsel for an inference is denied.

date than Kell; and that as Matejek testified, if Harrell had not been hired he would not have hired Kell because the other applicants had better qualifications.

General Counsel on brief contends that not only was Kell amply qualified for the position that was filled but indeed Kell was better qualified than Paul Harrell; that Kell was qualified to operate both of the cranes that Paul Harrell operated for CCC; that the Board has found that in refusal to hire cases the General Counsel needs only establish that the Union applicant was equally (not more) qualified as the person hired, *Sommer Awning Co.*, 332 NLRB 1318 (2000); that a comparison of the applications of Paul Harrell and Kell shows that Kell's length and breadth of experience was not just equal, but was significantly superior to Paul Harrell's; that Paul Harrell's conditional job offer states that CCC made the offer to him on August 20, the day before he apparently completed his job application; that of Hall, Owens, Rourke, and Branch, Matejek only interviewed Rourke and Matejek decided not to hire him although he was a former CCC employee because Rourke's former CCC supervisor indicated that there was a problem with his attitude; that it is clear that the applications of Hall, Owens, and Branch were never evaluated in comparison with Kell's until Matejek got on the witness stand, and provided after the fact, self serving comparisons; and that Matejek's testimony in this regard should not be credited, especially in the absence of any indication that he considered Kell's or the other applications for any purpose other than the litigation of this case.

Matejek already ruled out hiring Roark.[11] So for CCC on brief to include Roark, without qualification, is disingenuous at best. For the reasons stated above, it has not been shown that there was any Group Three or any Group Four in August 2001. In August 2001 Kell and Paul Harrell should have been on equal footing. But CCC now argues that Paul Harrell was given a preference. Why? It has not been shown that there was any policy in effect at the time which would justify this preference. As pointed out by General Counsel, a comparison of the applications of Kell and Paul Harrell shows that Kell was more qualified than Paul Harrell. CCC did not call either Paul Harrell or Keith Harrell to testify at the trial herein and so we are left with the testimony of Matejek with respect to what he was told. The problem with CCC's approach is that Matejek is not a credible witness. With respect to the applications of Hall, Owens, Rourke, and Branch, according to the testimony of Matejek, he only interviewed Rourke, and he ruled out hiring him because of what he was told when he checked with Rourke's prior supervisor. With respect to the other three applicants, a comparison of their applications with Kell's shows that he was as "well qualified"[12] if not better qualified than any of these three applicants for the crane operator position which CCC advertised. Additionally Kell had multicraft skills. Moreover, it was not demonstrated that CCC at the time material herein actually ruled out Kell on the basis of such a comparison. Even when he testified at the trial herein Matejek, who I find is not a credible witness, first testified that he would not have hired Kell if Paul Harrell had not been hired because CCC had other applications that were better than Kell's, but then testified "I probably would have, yes" when asked by CCC's attorney "[w]ould you have hired any of those guys before hiring Mr. Kell?" "Probably" from a witness who does not hesitate to lie even when under oath is not exactly an unequivocal statement. Additionally, as noted above the Board indicated in *FES*, supra,

> If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show at the hearing on the merits, that they did not possess the specific qualifications the position required *or that others (who were hired) had superior qualifications*, and that it would not have hired them for that reason even in the absence of their union support or activity. [Emphasis added]

It appears that In *FES*, supra, the Board specifically indicated that the comparison should be made with the others who were hired. In that way one can determine that an applicant had not been ruled out for some reason but rather the company decided to hire the individual. As noted above, of the four applications cited by CCC, Roark had already been ruled out by Matejek over a question of attitude. While both Kell and Paul Harrell indicated on their applications that they were employed at the time, all three of the other remaining applicants, namely Hall, Owens, and Branch, indicated on their applications that they were not employed. Matejek testified that he did not interview Hall, Owens, or Branch. Since they were not hired, how can one conclude that they were even seriously considered for purposes of comparison. CCC has not met the burden shifted to it to show that it would not have hired Kell even in the absence of his union activity or affiliation, and that Paul Harrell had superior qualifications. CCC violated the Act as alleged in paragraph 5 of the complaint.[13]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) and (3) of the Act by refusing to consider for hire and refusing to hire employee applicant Michael Kell.

4. The unfair labor practices set forth above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[11] As pointed out by Chief Judge Hand in *NLRB v. Universal Camera Corp.*, 170 F.2d 749, 754 (2d Cir. 1950), "[I]t is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all."

[12] *Sommer Awning Co*., supra at 1318.

[13] It is noted that in note 4 in *Sommer Awning Co.,* supra, the Board indicated that where the evidence establishes a refusal-to-hire violation, it is unnecessary to decide whether the respondent also violated the Act by unlawfully refusing to consider the applicant because the remedy for such a violation would be subsumed within the broader remedy for the refusal-to-hire violation.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily refused to consider for hire and refused to hire Michael Kell, it must offer him instatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from August 24, 2001 to date of proper offer of instatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, CCC Group, Inc., of Bartow, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to consider for hire and refusing to hire employee applicant Michael Kell because he is a union organizer or because of his union affiliation.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Michael Kell employment in the position for which he applied or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges; if necessary terminating the service of any employee hired in his stead.

(b) Make Michael Kell whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to consider and the refusal to hire Michael Kell, and within 3 days thereafter notify the Michael Kell in writing that this has been done and that the unlawful conduct of the Respondent will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Bartow, Florida facility copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 20, 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at Washington, D.C. May 7, 2003

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT Refuse to consider for hire and refuse to hire employee applicant Michael Kell because he is a union organizer or because of his union affiliation.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Michael Kell employment in the position for which he applied or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges that he would have enjoyed had he been hired.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL make Michael Kell whole for any loss of earnings and other benefits suffered as a result of our unlawful refusal to consider him for hire and our unlawful refusal to hire him, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to consider and the refusal to hire Michael Kell, and within 3 days thereafter notify Michael Kell in writing that this has been done and that our unlawful conduct will not be used against him in any way.

CCC GROUP, INC.